

CPLR 308(4): Insurer Who Disclaims Liability Is Without Standing To Object to Substituted Service

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Although there is no Court of Appeals decision construing this issue, lower court decisions appear to be in accord with the instant case.³¹

The facts of the case show an injury *without* the state which, however, resulted in consequential damages within the state through loss of earnings, hospital expenses and the like. In *Feathers* both the original injury and the consequential damages occurred within New York. Since the Conference intended to overrule the result reached in *Feathers*,³² it is doubtful that the amendment was meant to go beyond the facts of that case. In any event, keeping in mind the narrow approach taken by the Court of Appeals, it is unlikely that a more far-reaching effect would be recognized.

This conclusion is strengthened by the decision in *Platt Corp. v. Platt*,³³ where jurisdiction over the defendant was predicated on CPLR 302(a)(2). Defendant was a director of plaintiff corporation and did not attend meetings or perform any duties in New York. While the decision was predicated on the absence of a "tortious act within the state" under 302(a)(2), the Court did mention that even under the then proposed amendment to Section 302 (302(a)(3)), there would be no jurisdictional predicate. It would appear then that under 302(a)(3), the Court of Appeals will require some physical contact with the state and this means that the original injury must occur *within* the state itself. Moreover, realizing that every accident results in consequential damages in the plaintiff's home state, a holding to the contrary would most probably encounter serious due process questions.

*CPLR 308(4): Insurer who disclaims liability is
'without standing to object to substituted service.'*

CPLR 308(4) authorizes a court, upon ex parte motion, to provide for substituted service where service is "impracticable," under CPLR 308(1), (2) and (3). A method thus devised by a court is subject to the due process requirement that service be reasonably calculated to give the defendant notice of the pending suit and an opportunity to be heard.³⁴

In *Atomic Development & Machine, Corp. v. De Stefano*,³⁵ defendant's insurance carrier "unequivocally" disclaimed liability

³¹ E.g., *Rose v. Sans Souci Hotel, Inc.*, 51 Misc. 2d 1099, 274 N.Y.S.2d 1000 (Sup. Ct. Nassau County 1966).

³² *Judicial Conference Report on the Civil Practice Law and Rules*, 2 MCKINNEY'S SESSION LAWS 2780, 2786-90 (1966).

³³ 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966).

³⁴ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940), *rehearing denied*, 312 U.S. 712 (1941).

³⁵ 55 Misc. 2d 210, 284 N.Y.S.2d 873 (App. T. 1st Dep't 1967).

before commencement of any judicial proceedings. The civil court issued an ex parte order providing for substituted service on the defendant under CPLR 308(4), which included mailing of process to the defendant's insurance company.

The insurance company's motion to vacate and set aside the summons and complaint was denied. Because the movant disclaimed liability and declined to appear generally on behalf of defendant or itself, it was considered to be without standing to object to service.

The decision must be questioned in light of past cases. In *Winterstein v. Pollard*,³⁶ plaintiffs requested an order from the court directing them to serve process on the defendant by serving her insurance carrier. The facts showed that the defendant, a New York resident, had given her proper address to a policeman at the scene of the accident. She subsequently moved and mail addressed to her was returned. She was not listed in any current telephone books and the Department of Motor Vehicles had no other address for her. In denying the application, the court found that there had been insufficient showing that service was "impracticable" under CPLR 308(1), (2) and (3). The court felt that certain avenues under section 308 had not been utilized.³⁷ In any event the court felt that "[w]ithout some showing of the actual relationship between insurer and insured . . . it [could not] be said that notice to the insurer [was] reasonably calculated to give notice to the defendant."³⁸

In *Brodsky v. Spencer*,³⁹ an order issued by the court under CPLR 308(4), directing that service be made on defendant by mailing the summons and complaint to the Secretary of State and to defendant's insurance company was held inappropriate. The facts showed that defendant's address was a demolished building and his whereabouts unknown even to his insurance carrier. The court noted that since the insurance company did not know where the defendant was, service upon it was not "reasonably calculated to give notice to the defendant."⁴⁰

There appears to be no valid distinction where the insurance company is ignorant of defendant's whereabouts and when the carrier disclaims liability. In either case it should be allowed to

³⁶ 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966).

³⁷ See *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 912, 269 N.Y.S.2d 99 (1966); *Fishman v. Sanders*, 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (2d Dep't 1962) (mem.) (both allowing attachment of the insurance carrier's obligations under the policy); *Fishman v. Sanders*, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965) (allowing attachment of wages and publication); See also CPLR 3102(c) which provides for disclosure in aid of bringing an action.

³⁸ 50 Misc. 2d at 355, 270 N.Y.S.2d at 527.

³⁹ 53 Misc. 2d 4, 277 N.Y.S.2d 802 (Sup. Ct. Monroe County 1966).

⁴⁰ *Id.* at 6, 277 N.Y.S.2d at 805.

question the propriety of service authorized by a court under 308(4). In the latter case the interests of the defendant and his carrier conflict and denial to question the propriety of service under 308(4) may substantially affect the carrier's rights adversely.

CPLR 321: Insurance counsel not permitted to effectuate a disclaimer by withdrawal.

In *Bialy v. Reeber*,⁴¹ the court denied a motion to withdraw made by defendant's counsel. The attorney had been retained by defendant's insurance company to defend him. Prior to this motion the insurance company had attempted to disclaim for lack of cooperation on defendant's part because he gave two conflicting versions of the accident.⁴² Nevertheless the carrier was then held to be under a duty to defend. An exhaustive and diligent search having been made in an effort to locate the defendant, counsel predicated his motion to withdraw on the necessity of presence of the defendant at the trial.

The court conceded that the insurer might have grounds for a valid disclaimer but was unwilling to allow defendant's attorney to withdraw and thus use this as a "device to obtain or ratify a disclaimer-in-fact."⁴³ Generally, the courts require a plenary action for a declaratory judgment as to the insurance carrier's coverage liability.⁴⁴

An attorney "may terminate his relationship at any time for a good and sufficient cause and upon reasonable notice."⁴⁵ A good cause is found where it appears that the defendant and his insurance company are at odds, *i.e.*, where the insurance company disclaims liability under the policy. To require the attorney in such a case to represent the defendant would create a genuine conflict of interest. However, since the courts place a heavy burden of proof upon the insurer before liability may be disclaimed,⁴⁶ they will not permit counsel by way of withdrawal to effectuate a disclaimer. For, while, in reality, the attorney represents the insurer, his position is such that until there is a disclaimer, he has certain obligations to the insured.⁴⁷

⁴¹ 54 Misc. 2d 773, 283 N.Y.S.2d 450 (Sup. Ct. Suffolk County 1967).

⁴² "On the trial of the disclaimer action [defendant] gave several other versions and was characterized then . . . as an incredible witness—absolutely unworthy of belief." *Id.* at 774, 283 N.Y.S.2d at 452.

⁴³ *Id.* at 775, 283 N.Y.S.2d at 452.

⁴⁴ *Ganas v. Terry*, 16 App. Div. 2d 826, 228 N.Y.S.2d 999 (2d Dep't 1962) (mem.); *Brooks v. City of New York*, 1 Misc. 2d 740, 149 N.Y.S.2d 592 (Sup. Ct. Queens County 1956).

⁴⁵ *In re Dunn*, 205 N.Y. 398, 403, 98 N.E. 914, 916 (1912).

⁴⁶ *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967); *Amatucci v. Maryland Cas. Co.*, 25 App. Div. 2d 583, 267 N.Y.S.2d 41 (3d Dep't 1966) (Per curiam).

⁴⁷ *Bialy v. Reeber*, 54 Misc. 2d 773, 775, 283 N.Y.S.2d 450, 453 (Sup. Ct. Suffolk County 1967).